Supreme Court, U.S.
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In The

Supreme Court of the United States

Bobby W. Kennedy, et al, Pro Se

Petitioner,

vs.

Frigidaire Company, et al.

Respondent

Petition for Writ of Certiorari
In the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

BOBBY W. KENNEDY, ET AL.
Petitioner, Pro Se
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40 pp

QUESTIONS PRESENTED

1)Whether the petitioners were discriminated against and denied due process and equal protection of the law and denied a trial by jury when the circuit judge was biased against the petitioners issued a summary judgment in favor of the defendants, affirmed by the State Supreme Court, when the appellant's home was totally destroyed by fire caused by a defective clothes dryer that a notice of recall had been given to other purchasers ,and in fact purchaser had been paid by the manufacturer for their defective clothes dryer,and the petitioners had not been told by the defendant that their clothes dryer had been recalled admitting fraud and leaving the appellants in harms way for a disaster that happened and the other defendants that had a defective leaking propane tank removed the tank, and removed parts, spoiled evidence and covered up their defect before it could be inspected by state investigator authorized by state law to inspect all propane systems before the removal from the fire scene and the judge failed to give the petitioners the same due process and equal protection by allowing their case to go to a jury when state law required the spoliation and defective clothes dryer evidence to be decided only by a jury when the Jefferson County ,Alabama Circuit Judge allowed a case in that court of the defective White Westing-house , Frigidiare clothes dryer to go to a jury, while the biased judge against the appellants denied them a trial by jury with the same loss in Marshall County, Alabama.?

2) Whether judge violated the petitioners's constitutional rights when he instructed the plaintiffs that they could not win as Pro Se in his court without an attorney and the Frigidaire attorney withheld evidence and lied to the court and said that he did not have an expert witness investigative report of the fire scene when he did have an expert witness , report on the fire and denied of a recall of the defective clothes dryer . Defendants' expert told Bobby Kennedy that the window glass in the utility room that contained the clothes dryer was smoked up and that was where the fire started . Frigidaire had recalled the defendants clothes dryer and purchased the dryer from citizens and did not offer a recall to the plaintiffs and withheld and denied evidence of a recall after production request to the defendant explicitely requesting recalls of this defective clothes dryer that destroyed the plaintiffs' home ?

3). Whether the Circuit Court Judge was biased against the petitioners in not following the Alabama laws in making a decision on the Negligence, AEMLD, Spoliation, and Product Liability when law is clear and that these issues can only be decided by a jury and whether the judge had a right to make a decision on the AEMLD claims when the defendant Allgas admitted that the plaintiffs had an AEMLD claim against Frigidaire and Allgas and the law requires it to go to a jury.

PARTIES TO THE PROCEEDING

Bobby W. Kennedy, Carolyn S. Kennedy,and Jimmy P . Kennedy were the Plaintiffs in the lower court proceedings and the appellants before the Court of Civil Appeals of Alabama and Petitioners in The Supreme Court of Alabama.

Frigidaire Company,White Consolidated Industries, Inc. Sam's Club,Incorporated , Lampton Love Incorporated, Allgas Incorporated, C.L. Jimmy Fortenberry, Ronald Wayne Puckett, Bruce Laviner were the defendants in the case before the lower circuit court proceedings of this case and the appellees before the Court of Civil Appeals of Alabama and Respondents in The Supreme Court of Alabama.

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In The

SUPREME COURT OF THE UNITED STATES

BOBBY W. KENNEDY, ET AL

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Petition for Writ of Certiorari to the
Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On November 17, 2000 the Supreme Court of Alabama issued its opinion on the petition for writ of certiorari,affirming the decision of the Court of Civil Appeals of Alabama and the Circuit Court with no opinion.

JURISDICTION

The circuit court rendered its opinion in this case on August 30, 1999 . The Court of Civil Appeals affirmed the judgment on June 9, 2000 with no opinion. An application for rehearing was overruled on August 4, 2000 with no opinion by the Court of Civil Appeals of Alabama. The petitioner moved for a Petition for Writ of Certiorari in the Supreme Court of Alabama and November 17, 2000, the writ was denied. On December 1, 2000 the Supreme Court of Alabama ordered that the application for rehearing filed on November 28, 2000 be striken. Petitioner made a motion to set aside the order striking the application for rehearing and to remand to circuit court for a trial by jury and the order was striken on December 13, 2000 by the Supreme Court of Alabama. This is the judgment sought to be reviewed.This court has jurisdiction to review the judgment of the Supreme Court of Alabama by Writ of Certiorari pursuant to 28 U.S.C. 1257

STATUTES INVOLVED

Under Articles of the Constitution of the United States, 28 USC 1251 and U.S. Constitution Amendments 5, 11, 14, 28 U.S.C. Section 1346 et. seq., under Title VII Civil Rights Act of 1992 and 42 U.S.C. S 2000(e), 28 U.S.C. S 2254b
National Fire Prevention Association 921. S 9-3-1-c at p. 921-66 , (1995 ed), AEMLD, Civ. Proc. 44, Civil Rights Act 1964 , Title VII "Equal Protecton and due process clause."

STATEMENT OF THE CASE

This action was filed in the United States Circuit Court, Marshall County, Alabama, Guntersville Division on April 3, 1997 seeking remedies under AEMLD, 14th Amendment, 5th Amendment, Civil Rights Act 1964, Title VII, and Civil Procedure 44, Product Liability , State Tort Laws . The petitioners contend that they have been denied due process, equal protection, an discriminated against and denied a trial by jury when the circuit judge was biased against the appellants, issued a summary judgment in favor of the defendants, affirmed by the Supreme Court, when the appellants' home was totally destroyed by fire caused by a defective clothes dryer that a notice of recall had been given to other purchasers and , in fact, purchasers had been paid by the manufacturer for their defective clothes dryer, but had not been given to the appellants, leaving the appellants in harms way for a disaster that happened, and the petitioners were denied due process and equal protection of a court trial when they produced substantial evidence that the clothes dryer was defective and was the cuase of the fire that set off the leaking defective propane tank of spoliation when a defective, leaking propane tank and evidence was removed from the scene and parts were removed before the appellants, their expert witness, or the LP Gasboard inspector could inspect the tank at the scene of the fire. This is a clear violation of the AEMLD law. The petitioners' civil rights were violated and were discriminated against and denied due process and equal protection of the law under the 5th and 14th Amendment to the U.S.

Constitution to have a trial by jury when others similarly situated had had a trial by jury . The petitioner had survived a summary judgment and judge Jetton said there were material facts of law that demanded a jury trial when Judge Jetton set a date for the case to go to trial, then this senior judge retired, and Judge Jolley took over and reversed the senior judge's decision and issued a summary judgment in favor of the defendants. This judge failed to give the appellants the same due process and equal protection under the law by not allowing their case to go to a jury when state law required the defective dryer coverup, fraud and the spoliation evidence to be decided only by a jury . The Jefferson County, Alabama circuit judge allowed the fire case of the same brand defective clothes dryer to go to a jury where the plaintiffs won their case. The appellants' constitutional rights under the equal protection and due process were violated when the circuit judge instructed the plaintiffs that they could not win in his court without an attorney. The courts of Alabama have been biased against Pro Se plaintiffs with dismissal of cases with no justice under the U.S. Constitution.

Undisputed Fact

1. The Petitioners lost a home, contents, and personal property by a fire .

2. The defendant, Frigidaire, knew of the defective clothes dryer that had been recalled prior to the appellants' fire, but said there was no recall on their clothes dryer .

3. The defendant, Allgas, removed their propane tank from the fire scene and removed parts before the tank was inspected on the fire scene and defendant's, Allgas, admitted spoliation .

4. The appellants were treated differently by the Marshall County, Alabama Court than the Jefferson County, Alabama Court that allowed a fire case involving this same clothes dryer to be heard by a jury. Other clothes dryer cases in the United States were also afforded a jury trial.

5. Judge Jetton, senior judge, in the first summary judgment stated , "Upon consideration of the defendants Motion for Summary Judgment supporting and opposing this court finds there are genuine issues of material facts and that the defendants motion should be and are hereby overruled.

6. Judge Jolley who replaced Judge Jetton when he retired stated in the second summary judgment, there were no genuine issues as to any material facts .

7. Alabama law states in AEMLD, the defective clothes dryer, fraud, discrimination, due process, and equal protection spoliation cases, only a jury can decide on these cases.

Petitioner's Position

Petitioners contend they were discriminated against and denied due process and equal protection, denied a trial by jury, and their constitutional rights of equal protection were violated when different scales of justice were used and the petitioners were treated differently than other courts treated similar cases.

The judge was biased against the appellant and had prejudice against the appellants , Pro Se, as it was first surfaced when Judge William Jetton told the appellants they can not win in his court because they

are not lawyers. The circuit judge, Judge Jolley, was biased against the plaintiffs because they started the law suit Pro Se and not attorneys and the judge erred in making a judgment that only a jury by law must decide this case. Jolley were biased against the appellants and treated them differently in Marshall County than the Jefferson County Court treated the plaintiff Wilkerson in a case that involved the same clothes dryer where they won a judgment of $150,000.00 for their home which was destroyed by this defective, recalled clothes dryer. White Consolidated Industries, Inc. et al. v. American Liberty Insurance Company and Mary Evans McKinney, S. C. 1911560, April 2, 1993. (Ala.). Also, White Consolidated Industries, Inc. v. Albert C. Wilkerson Brenda Wilkerson, and Vesta Fire Insurance Company SC 1971220, Supreme Court of Alabama, April 23, 1999. Petitioners equal protection under the U.S. Constitution were due the same justice given by the Jefferson County versus Marshall county.

Judge Jolley erred when he stated that the deposition of plaintiff's expert indicates that there is nothing more than mere speculation as to several possible causes of the fire . Steve Hollich , plaintiff's expert witness,states, "the dryer overheated or somehow created an ignition source that was high enough to ignite this propane gas " A. Right" Judge Jolley also stated , "Further the affidavit of plaintiffs' expert contradicts his deposition testimony and is striken also for that reason". Hollich, plaintiff's expert witness's affidavit states, "The propane gas was ignited by the clothes dryer and this caused the fire". There was no contradiction and the statement in his deposition and his affidavit was the same.

Plaintiffs produced substantial evidence of defective recalled clothes dryer and spoliation when Allgas removed the defective propane tank from the fire scene before anyone , the plaintiffs, their expert witness, or the LP gasboard inspector , could inspect the tank. Parts were removed,and the tank was re-painted before the plaintiffs or expert witness was able to inspect the tank. There were also recalls on the clothes dryer and defendant's attorney, Ward Wilson, admitted, "As to their claims against Allgas and other related defendants, they have got an AEMLD claim just as they've got one against the dryer company."

Petitioners were not afforded their rights in this case .Judge Jolley did not consider affidavits as he stated in the order for summary judgment. They were striken. Jolley erred. docket sheet shows Motion by defendant on 9-2-99 to strike affidavits. The Motion by defendant to strike the affidavits were filed 9-2-99 after Jolley's Order for Summary Judgment on 8-30-99. The affidavits were filed on 8-6-99, in the Marshall County Circuit Court and Jolley said they were striken in order on 8-30-99. Defendant had not filed to strike affidavits until 9-2-99. Dan King, plaintiffs' attorney, sent a letter to Judge Jolley concerning affidavits and leave to file 7 days late, 9-26-99.

New evidence, letter from CNBC, received after the petition for Writ of Certrioria was submitted in August 17, 2000, clearly shows that Frigidaire violated the Alabama Extended Manufacturer Liability Doctrine,AEMLD, by recall the clothes dryer that caused the fire and destroyed the plaintiff's home was recalled in Canada and was never told to the American people, the same tactics that Firestone

was using in other countries, but giving no notice to the American people and caused loss of many lives and millions in damages while keeping quiet to the American people. An enormous number of homes were destroyed in the United States, Canada, and the rest of the world with no doubt many lives of people were lost in house fires while this clothes dryer overheated, caught on fire and destroyed their home while the dryer was supposed to cut off when actually the heating element sagged and caused the element to short and stay on after the clothes dryer timer was supposed to have shut the dryer off. This is a clear violation of the AEMLD law and this case is due to be remanded for a trial by jury as the only way this case can be settled by law. The Frigidaire Company had a fix for this problem in Canada and recalled the dryer to have a switch installed, but never recalled the dryer in the U.S. The Frigidaire Company also gave $230.00 refund for the same dryer in Canada and offered no refund in the U.S. Frigidaire discriminated against the appellants and other owners in the U.S. This case should be certified as a class action against Frigidaire for their negligence , willful and wonton act against the American consumer.The appellees claimed recalls of the clothes dryers were heresay when in fact there were recalls and Frigidaire offered consumers $230.00 for the clothes dryers that were recalled.

As part of the clothes dryer recall and coverup Frigidaire has pulled their parts manual and their operating manual off the market and away from dealers and customers . They are covering up their AEMLD failed product in the same manner as Firestone's deadly tire problems and they knew of the dangerous product that could cause the death of

customers by the clothes dryer staying on even when the timer had shut off while customers were asleep causing deaths by burning their house up around them. Frigidiare chose to cover up this faulty product that violated the AEMLD law and the U.S. Consumer Product Safety laws.

ARGUMENT

1). Whether the petitioners were discriminated against and denied due process and equal protection of the law and denied a trial by jury when the circuit judge was biased against the appellant, issued a summary judgment in favor of the defendants, affirmed by the State Supreme Court, when the appellant's home was totally destroyed by fire caused by a defective clothes that a notice of recall had been given to other purchasers, and in fact, purchaser had been paid by the manufacturer for their defective clothes dryer, and the petitioners had not been told by the defendants that their clothes dryer had been recalled admitting fraud and leaving the appellants in harms way for a disaster that happened and the other defendants that had a defective leaking propane tank removed parts from the tank, spoiled evidence and covered up their defect before it could be inspected by state investigator authorized by state law to inspect before the removal from the fire scene and the judge failed to give the petitioners the same due process and equal protection by allowing their case to go to a jury when state law required the spoliation and defective clothes dryer evidence to be decided only by a jury when the Jefferson County, alabama Circuit Judge allowed a case in that court of the defective Whit Westinghouse, Frigidaire clothes dryer to go to a jury, while the biased judge against

the appellants denied them a trial by jury with the same loss in Marshall county, Alabama?

In this case Bobby W. Kennedy et al. v Frigidaire, Inc. et. al. the decision of the Marshall Circuit Court was affirmed with no opinion by the Court of Civil Appeals. The decision is in conflict with a prior decision of the Supreme Court on the same point of law. In its opinion the court held White Consolidated Industries, Inc. v. Albert C. Wilkerson, Belinda Wilkerson and Vesta Fire Insurance Company. 1971220, Supreme Court of Alabama , April 23, 1999, the Supreme Court held and affirmeed in part for the property damages under the AEMLD and remanded the cause for a new trial or other proceedings consistent with this opinion.

Circuit Court Judge Jolley erred in granting summary judgment as a matter of law stating there was no genuine issue as to any material facts after the defendant Allgas had admitted in their brief that the plaintiff had a claim under the AEMLD.R-18, par 3 .

A claim under the AEMLD is grounded in tort and is premised on the motion that "a[manufacturer's marketing] a product not reasonably safe, when applied to its intended use in the usual and customary manner, constitutes negligence as a matter of law "Casrell v. Altec Industries, Inc. 335 So.2d 128, 132 (Ala. 1976) (emphasis in original). "Under the AEMLD, a manufacturer has the duty to design and manufacture a product that is reasonably safe for its intended purpose and use."Townsend v. General Motors Corp. 642 So.2d 11, 415 (Ala. 1994).

In Alabama Power Company v. Garrett Murray and Fragil Murray, 1971174 Supreme Court of Alabama, August 6, 1999, the supreme Court

Cook, J. held that (1) jury instruction on spoliation of the evidence was justified. The appellees Allgas spoiled evidence by removing the tank from the fire scene, replaced parts, and painted the tank before the plaintiffs or their expert witness, or the Ala LP gasboard inspector could inspect the propane tank at the fire scene. This is tampering with evidence and against Alabama law and an automatic admission of guilt. The plaintiff should have won by Alabama law on spoliation and Judge Jolley erred by not granting a trial for the plaintiffs. Also (the spoliation of evidence doctrine was applicable where there was evidence tending to show that the defendant "had purposely destroyed the [evidence] or had intentionally caused its destruction").Alabama Waste Services, Inc. 709 So.2d 61, 66 (Ala. Civ. App 1998) In Empiregas Inc. of Huntsville v. Ernest R. Simpson and Alfa Mutual Insurance Company, 87-1486, Supreme Court of Alabama May 26, 1989, Supreme Court,Jones J. held that (2) trial court properly submitted theory that furnisher was liable under extended manufacturer's liability doctrine for jury determination. In Carol Powers Atkins v. American Motors Corp. et al. SC 1488, Supreme Court of Alabama, May 21, 1976, the Supreme Court held : that complainant sufficiently alleged cause of action predicated on theory that defendant marketed a product that was not reasonably safe when used for its intended purpose. The trial court Judge Jolley should have sent the appellant's case for jury trial.

In our case, Bobby W. Kennedy et. al. v. Frigidaire et. al., Judge Jolley had wrongfully struck the affidavits filed by the plaintiffs and the affidavits of the plaintiffs' expert and Judge Jolley further stated the plaintiffs expert contradicts his desposition

testimony and is stricken.He should have granted a trial and allowed the affidavits and allowed the expert witness to explain any statements that he had made.There was no contradiction and the statement in his deposition and his affidavit were the same. Hollich's affidavit, and Hollich's deposition. He stated the propane gas was ignited by the clothes dryer and this caused the fire. Further, Judge Jolley's statement there is no genuine issue as to any material facts and defendants are entitled to a judgment as a matter of law was in error. Senior Judge W. Jetton had previously ruled that there were genuine issues as to material facts and denied the defendants a summary judgment. A defect of the Frigidaire White Consolidated Industries clothes dryer was detected and had been recalled for shorting in the heating element and causing house fires after the timer had shut off . Further Allgas was guilty of spoliation of evidence by removing and destroying evidence of the propane tank and the propane gas system.
Fire insurer seeking subrogation from dryer manufacturer for amount paid to insureds after fire destroyed their home and rare book collection, introduced evidence at trial that excluded misuse of dryer as cause of fire and was sufficient to allow jury to infer that dryer was defective and thus caused fire. Weir v. Federal Ins. Co., 811 F.2d 1387, C.A. 10 (Colo.) 1987

The judge bought the defendants' story over the plaintiff and the defendant offered phony evidence and lied and committed fraud when he said the manufacturer had no recalls or no expert witness report.

Evidence offered by defendant that is contrary to evidence offered by plaintiff creates question for jury

in products liability action; it does not prevent jury from relying on plaintiff's evidence and inferring defect. Weir v. Federal Ins. Co. 811 F.2d 1387

There was no warning given to the plaintiff after defendant had recalled the clothes dryer because it had destroyed thousands of homes because of defects. Jury has wide latitude in finding that product is unreasonably dangerous because it could have been constructed so as to reduce risk of injury. Adams v. Fuqua Industries, Inc. 820 F.2d 271. C.A.8 (Mo.) 1987.

Under New York law, question of superseding cause in products liability action is generally one for jury, and only in rare instances can question be decided as matter of law. Parsons v. Honeywell, Inc. 929 F.2d 901. C.A. 2 (N.Y.) 1991

The Petitioners were treated different under Alabama law than other plaintiffs in cases in Alabama and other states unequal justice and due process.

When assumption of risk is raised as defense in products liability action, whether plaintiff knows of existence of risk and whether he appreciates its magnitude and unreasonable chaaracter are questions of fact to be determined by jury; however, before theory may be submitted to jury, defendant must produce evidence that plaintiff fully understood specific risk and yet voluntarily chose to enounter it. Wagner v. Firestone Tire & Rubber Co., 890 F.2d 652 C.A.3 (Pa) 1989

Whether warning on product is adequate is usually question for jury unless reasonable minds could not disagree on outcome. Goins v. Clorox Co., 926 F.2d 559.

Petitioner's case should have been presneted to a

jury. There was no due process because plaintiffs' rights were violated by judge because there was no jury trial on issues that required a jury. AEMLD and Spoliation, which was admitted by defendant, alone was an issue for jury trial.

Petitioners' expert witness testified that the only possible source of fire was the clothes dryer and smoked window glass of the utility room where the fire started was admitted by the defendants' expert witness, that the fire started in the utility room.

Under Texas products liability law, directed verdict should not have been granted in strict products liability action involving allegedly defective television set that allegedly caused a fire, where could testified sparks appeared at rear of television set and expert witnesses opined that television set was the only possible source of the fire and that the fire began inside the set. Ayres v. Sears, Roebuck & Co. 789 F.2d 1173. C.A. 5 (Tex) 1986

If trier of fact found that prior fire put manufacturer on notice of defect in heater, it could find that the manufacturer acted with reckless indifference to public safety by failing to either recall heater in question or warn consumers of the problem by the time of the fire in question some 11 months later, even though the heater in question was manufactured prior to the initial fire. Bastial v. TPI Corp. 663 F.Supp 474, N.D.Ill 1987.

The defendant knew of the defect and had recalled the same clothes dryer in Canada before the petitioners fire and did not notify the petitioner of the danger.

Petitioner established a prima facie case ; the clothes dryer was recalled because it stayed on and overheated after the timer had shut off resulting in

100,000 house fires.

Manufacturer could have warned of the dangers of the clothes dryer defect and avoided accident of house fire.

Evidence was sufficient to support inference that riding lawnmower was unreasonably dangerous such that manufacturer could be held strictly liable for injuries sustained by owner; there was evidence of blade injuries resulting from tip-over accidents and that deadman device might have prevented owner's injuries and could reasonably have been installed. Tafoya v. Sears roebuck and Co. 884 F.2d 1330 C.A. 10 (Colo.) 1989

Injured plaintiff need not prove that absent safety devices were or should have been known to lawn mower manufacturer at time mower was manufactured in products liability action, as whenter lawn mower was as safe as other lawn mowers manufactured at same time was irrelevant to question as to whether lawn mower was unrasonably dangerous. Adams V. Fuqua Industries, Inc. 820 F.2d 271 C.A.8 (Mo.) 1987

Testimony of one of Swedish chain saw manufacturer's quality managers that swedish regulations required chain brakes on chain saws prior to year in which chain saw without chain brake was sold in Alabama wa admissible in products liability diversity action against manufacturer to recover for injuries sustained while operating chain saw in order to show that manufacturer knew first hand that chain brakes were very beneficial. Nettles v. Electrolux Motor AB, 784 F.2d 1574 C.A.11 (Ala.) 1986.

The above case shows substantial sumilarity . The clothes dryer in Jefferson County was the same as the petitioners, a Frigidaire manufactured model.

Alabama product liability : The defect in clothes dryer was liability in state tort laws to purchaser. Defect in clothes dryer caused the clothes dryer to stay on after the timer had shut off causing fire to destroy home. No warning was ever supplied the owner of clothes dryer of the defect even though the manfacturer recalled the dryer and paid other purchasers for the same defective clothes dryer.

ED Mich. 1996 Obvious danger associated with a product will obviate manufacturer's product liability duty to warn and/or protect and a failure to (ED Mich. 1991) warn and design defect product liability and remain broadly accepted principle of product liability law.

1996 Treadway v. Smith & Wesson Corp. 950 F. Supp 1326

1991 Raines v. Colt Industries, Inc. 757 F. Supp. 819

DN5 1996 Manufacturer is under duty to warn foreseable user of danger if machine is not safe

Finley V. NCR Corp. 964 F Supp 882

Due process and equal protection clause appears in both Fifth and Fourteenth Amendments, whereas equal protection clause does not, primary office of latter differs from and is additive to, protection guaranteed by former Hampton v. Mow Sun Wong (1976) 426 US 88, 48 L. Ed 2d 495, 96 S Ct 1895, 12 BNA FEP Cas 1377, 11 CCH EPD P. 10955. Fourteenth Amendment does not prohibit legislation limited as to objects or territory, but merely that all persons subject to it shall be treated alike, under like circumstances and conditions. Hayes v. Missouri (1887) 120 US 68, 30 L.Ed 578, 7 S Ct 350. Equal protection of laws is pledge of protection of equal laws to all under like circumstances . German Alliance Ins. Co. v. Hale (1911) 219 US 307, 55 L.Ed

229, 31 S Ct 246.

Purpose of equal protection clause in Federal Constitution is to rest rights of all persons upon same rule under similar circumstances . Frost v. Corporation Com. of Oklahoma (1929) 278 US 515, 73 L. Ed 483, 49 S Ct 235.

Fifth Amendment forbids discrimination that is so unjustifiable as to be violative of due process Rock v. Arkansas (1987) 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704, 22 Fed Rules Evid Serv 1128.

White Consolidated, Inc. is the parent company of Frigidaire and WhiteConsolidated makes several clothes dryers under the names of Frigidaire, Gibson,White Westinghouse, Kelvinator, and etc. and they all are of the same model and design with different names, but are the same except for names. The Supreme Court of Alabama case White Consolidated Industries, Inc. et al. v. American Liberty Insurance Company and Mary Evans McKinney, 1911560, April 2, 1993 involving the White Consolidated Industries clothes dryer is the same company that manufactured. The clothes dryer manufactured by White Consolidated Industries malfunctioned and caused the fire that destroyed Mary Evans McKinney's house. This case was decided in her favor in Jefferson County, Alabama Circuit Court. This is a parallel case to Bobby W. Kennedy, et. al. v. Frigidaire, et. al. involving the same company's clothes dryer that was under recall that destroyed the appellants house. The appellants did not receive the same or basic justice as Mary Evans McKinney received in Jefferson County Circuit Court. The laws of Alabama and the material facts in this case required Judge Jolley to allow a jury to decide this case. Instead, he issued a wrongful

summary judgment against the appellant. In SC 1911560, Supreme Court of Alabama, April 2, 1993, the Supreme Court held that : (l) prior inconsistent statement is inadmissible to impeach witness unless proper foundation is laid : (2) counsel's tardiness in releasing information regarding plaintiff's expert witness less than two weeks before trial did not require exclusion of witnessess' testimony; and (3) verdict for homeowner was not excessive. AFFIRMED. 1. Constitutional law : Equal protection clause prohibits prosecutor from using peremptory jury strikes in a bias discriminatory manner U.S.C.A. Const. amend l4. 2. Witnesses : Prior inconsistent statement is inadmissible for impeachment, unless foundation is laid by asking witness about statement at issue, even though statement is admissible heresay as business record. rules Civ. Proc. Rule 44. 3. Witnesses :Although foundation requirement for impeaching witness with prior inconsistent statement is not to be rigidly applied, witness must be given such notice of prior statement as should be necessary to job faulty memory, thus allowing witness to recognize and to either deny or explain earlier inconsistency : 8. Evidence : Products Liability Expert testimony and testimony of homeowner that she saw flames coming out of back of clothes dryer supported verdict against manufacturer's successor, even though expert testimony was conflicting. 9. Damages Award of $150,000 against successor to dryer manufacturer was not excessive for damages suffered by homeowner who sustanied compression fracture as result of jumping from window to avoid fire that started with clothes dryer. Homeowner and insurer brought action against successor to dryer manufacturer to

recover for damage caused by fire that began with clothes dryer and jury verdict was in favor of homeowner and insurer. Defendants attorneys were William Dudley Motlow, Jr.and Gary L. Weaver of Porterfield, Harper & Mills, P.A. Birmingham, for appellants in the Supreme Court case and White Consolidated Industries was the defendant in the Civil Court case originally. This is the same firm that are defendants for White Consolidated, Inc. and Frigidaire in this case and the same firm that have denied any cases involving White Consolidated Industries, and Frigidaire house fires from defective clothes dryers .

2). Whether the judge violated the petitioner's constitutional rights when he instructed the plaintiffs that they could not win as Pro Se in his court without an attorney and the Frigidaire attorney withheld evidence and lied to the court and said that he did not have an expert witness investigative report of the fire scene when he did have an expert witness report on the fire and denied of a recall of the defective clothes dryer. Defendants' expert told Bobby Kennedy that the window glass in the utility room that contained the clothes dryer was smoked up and that was where the fire started ?

White Consolidated Industries and Frigidaire refused to provide discovery on 10,000 house fires caused by their clothes dryers and a recall on this model clothes dryer that caused this fire where their dryer heating element shorted to the dryer and stayed on after the clothes dryer timer had supposedly shut the dryer off. This defect overheated the clothes dryer and ignited the leaking propane gas

from Allgas' propane tank and system that was never tested to check for leaks prior to turning the propane on into a dwelling putting everyone's life at risk and then removing the propane tank immediately after the fire and was guilty of spoliation of evidence to prevent the propane tank and system to be inspected for failure by the state LP gasboard inspector violating state law of removing the tank, fixtures, and spoiling evidence to cover up the negligence. The appellants have laid a predicate for introduction to records such as recalls of White Consolidated Industries, Inc. clothes dryers and the insurance company's expert witness report that was requested by the appellants before the lawsuit was filed and the same report the appellees' attorney denied existed, then found the report after the judge had dismissed the case and said if he found there was a report that had not been shown he would blow this case apart. Christie states, "I don't recall there being a report."

Alabama statutes set forth the elements of fraud (Ala. Code S 6-5-100) misrepresentation of a material fact (Ala. Code S 6-5-101), suppression of a material fact (Ala. Code S 6-5-102), deceit (Ala. Code S 6-5-103) and fradulent deceit (Ala. Code S 6-5-104). The elements of fraudulent misreprsentation are : a false representation which : (1) is known to be false when made or (2) is made recklessly without regard to its truth or falsity, or (3) is said to be true without actual knowledge if it is true; b. reliance on the false representation; c. such reliance was reasonable; and d. damage proximately resulting from the reliance. Foremost Ins. Co. v. Parham, 696 So. 2d 409 (Ala 1997); Patel v. Hanna, 525 So. 2d 1359 (Ala. 1988); McAlister v. Deatherage, 523 So. 2d 387 (Ala. 1988).Frigidaire knew that they had

recalled the defective clothes dryer and stated in court that they had not had a recall.

In order to establish a claim for fraud based upon a party's failure to perform future acts as promised, a plaintiff must not only show that the defendant intended to deceive the plaintiff at the time the representation was made and that the defendant had no intent to perform at the time the representation was made. National Sec. Ins. Co. v. Donaldson, 664 So. 2d 871 (Ala. 1995)

The party alleging fraud must show that she relied on the misrepresentation. Timmons v. Central Bank of the South, 28 So. 2d 845 (Ala. 1988).

The petitioners relied on the clothes dryer to be safe and Frigidaire misrepresented the clothes dryer as safe and the petitioners' house burned down.The defendant had a duty to disclose a material fact, the defendant failed to disclose and concealed the material fact and the defendant's failure to disclose, or concealment of, the material fact induced plaintiff to act or to refrain from acting ; and the plaintiff suffered damage as a result of the action, or inaction, induced by defendant's failure to disclose, or concealment of, the material fact. Compass Point condominium Owners Ass'n v. first Federal Sav. & Loan Ass'n of Florence, 641 S. 2d 253 (Ala. 1994); Howard Griggs Trucking, Inc. v american Central Ins. Co. 894 F. Supp. 1503 (M.D. Ala. 1995); American Economy Ins. Co. v. Fort Deposit Bank, 890 F.Supp. 1011 (M.D. Ala. 1995)

Frigidaire and Allgas were fraudulent in that their products were unsafe, with no warning to the petitioners.

If the seller or agent has knowledge of specific defects that would affect health or safety and the

defects are not known to or readily observable by the purchaser, the vendor or agent has a duty to disclose the information about the defects and is liable for damages caused by failure to disclose. Roberts v. C & S Sovran Credit Corp. of Alabama 621 So. 2d 1294 (Ala. 1993).

Sam's Wholsesale Club did not disclose the information about the defects.

Warranties created by the seller by affirmation of fact or promise which relat to the good and becomee part of the "basis of the bargain" require that the good shall conform to the description, whether or not the seller is a merchant. Ala. Code S 7-2-313. Liberty Truck Sales, Inc. v. Kimbrel, 548 So. 2d 1379 (Ala. 1989) A merchant warrants that the goods are fit for the ordinary purposes for which goods of that kind are used. ala. Code S 7-2-314 Century 21-Reeves v. McDonnell Cadillac, 626 S. 2d 1273 (Ala. 1993)

Frigidaire breached their contract for selling a clothes dryer that was defective.

The buyer may sue for economic loss and may recover damages for any non-conformity of tender proximately resulting from the seller's breach as determined in any manner which is reasonable . Ala. Code SS 7-2-714, 7-2-717.

A consumer may recover for injury to person or property proximately resulting from any breach of warranty. Ala. Code S 7--715 Volkswagen of america v. Dillard, 579 S. 2d 1301 (Ala. 1991)

Frigidaire and Allgas were responsible to the appelants under 15 USC 2301 thru 2312 and failed to provide a safe product and are liable for damages.

Compensatory damages in an action for fraud consists of the difference between the value of the property as represented and its actual value. Johnny

Spradin Auto Parts v. Cochran, 568 S. 2d 738 (Ala. 1990); Danley v. Murphy, 658 S. 2d 483 (Ala. Civ. App. 1994)

Frigidaire and Allgas are responsible for compensatory damages.Frigidaire knew of the fraud and had settled with others and purchased their defective clothes dryers back.

Fraud or misrepresentation may be proven through evidence of similar fraud/misreprsentation against others. Evidence of similar fraudulent acts is admissible to show the fraudulent intent, plan, or scheme, provided that act sought to be proven meets requirments of similarity in nature and proimaty in time. Shoals Ford, Inc. v. McKinney, 605 So. 2d 1197 (Ala. 1992) Keebler v. Winfield Carraway Hosp., 531 So. 2d 840 (Ala. 1988)

Frigidaire's attorney produced the report to Judge Jolley and claimed camera. After receiving the report in *camera*, the judge said it was work product. Jolley erred. If the defendant's did not know about the report, and again said that there was no report, how could it be a work product as Judge Jolley ruled This was not a work product and it was withheld from the plaintiffs and their attorney and the plaintiffs were denied due process and equal protection because this report should have presented to the plaintiff when they asked for it in discovery. This case parallels our case on records for the purpose of putting into evidence because unlike WCI in White Consolidated Ind. v. American Liberty, SC 1911560, April 2, 1993, the appellants have laid a predicate for their introduction before the lawsuit was filed, after the lawsuit was filed, and after summary judgment. The judge erred by not compelling Frigidaire, White Consolidated Industries, Inc.'s expert witness's

investigative report. At the time the Pyrotec investigator expert was hired by Crawford Insurance Co. for Frigidaire, a lawsuit had not been filed by Bobby W. Kennedy et al. Bobby Kennedy told the expert witness he could begin his investigation with a promise that he would provide a copy of the report to bobby Kennedy, and this promise was made before Bobby Kennedy agreed to allow him to perform an investigation. The Pyrotec investigator, Richard Keith, showed Bobby Kennedy the smoked glass in the room that contained the clothes dryer and told him the fire started in this room and removed the smoked up clothes from the dryer and marked them as exhibit one and these clothes showed they had been smoldering for some time before the propane gas was ignited by the defective clothes dryer and also showed him the other window glasses in the house that were not smoked up and stated that the smoked up window in the room that contained the clothes dryer showed that the smoke had been in that room for several hours in order to smoke and stain the glass in that room's windows.

In Dubert v. Merrell Dow Pharm, Inc. 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L. Ed.2d 469 (l993) Dubert demand is that the trial judge makes a "preliminary assessment" of whether the proffered testimony is both reliable (i.e.based on "scientific knowledge") and helpful (i.e. of assistance to the trier of fact in understanding or determining a fact in issue) however; there is no requirement that the proffering party must "prove" anything to the court before the testimony in question can be admitted.

The original circuit judge stated in the first court hearing that the plaintiffs could not win in this court

without an attorney.

The basis of this petition for the writ is that a material question requiring decision was one of first impression in the appellate courts of Alabama and was incorrectly decided. The issue is whether the new circuit court judge, Judge Jolley,erred in granting summary judgment in favor of the defendants after a senior judge,Judge Jetton, had ruled that there are genuine issues of material fact and defendants motion shall be and are hereby overruled. The second judge,Judge Jolley, granted Motion to Continue Trial and on 6-3-99 reset for trial Sept 7,1999 at 9 :00 a.m. Frigidaire and White Consolidated Industries filed a motion for second summary judgment on 6-24-99 and Judge Jolley granted summary judgment when defendants refiled their motion for summary judgment. 8-30-99. The genuine issues of material facts had not changed in this case.Where a jury trial is requested, the circuit court is not free to decide factual issues, and if any material issues are present in the record , the court must deny the motion and proceed to trial. Warrior Tombigbee Trnasportation v. M/V Fung, 695 F.2d at 1296. "Summary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the necessary nonmoving party." Anderson v. Liberty Lobby, Inc. 477 U.S.242, 248, l06 Ct 2505, 2510, 91 L.Ed.2d 202 (l986). The party seeking summary judgment bears the burden of demonstrating that there is no dispute as to any material fact in the case. Warrior, 695 F.2d at 1296. "In assessing whether the movant has met that burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the [non-moving] party"

and resolve ' all reasonable doubts about the facts . . in favor of the non-movant'" id (citation omitted). The plaintiffs requested trial by jury. The plaintiffs did have, as Judge Jetton stated, "genuine issues and material facts." The defendants themselves have not proved that the clothes dryer did not overheat and create an ignition source that was high enough to ignite the propane gas. The Alabama Supreme Court itself ruled that both the plaintiff and the defendant must prove their case "by substantial evidence". They basically ruled that the standards of proof needed to be identical for both parties .They ordered a new trial based on that. Brenda Cackowski v. Wal Mart, Supreme Court of Alabama Case 1981204, decision 1-21-2000. Wal Mart did not prove anything, the same as Frigidaire and Allgas.They offer no cause of the fire, etc.

3) Whether the circuit court judge was biased against the petitioners in not following Alabama laws in making a decision on the negligence, AEMLD, Spoliation, and product liability when the law is clear and that these issues can only be decided by a jury and whether the judge had a right to make a decision on the AEMLD claims when the defendant Allgas admitted that the plaintiffs had an AEMLD claim against Frigidaire and Allgas and the law requires it to go to a jury?

In White Consolidated Industries, Inc. et. al. v. American Liberty InsuranceCompany and Mary Evans McKinney, 1911540, Supreme Court of Alabama, April 2, 1993, expert testimony and testimony of homeowner that she saw flames coming out of back of clothes dryer supported verdict against

manufacturer's successor, even though expert testimony was conflicting. In appellants' case : 1) Don Weaver,next door neighbor, first witness on the scene, saw flames from propane tank spray fire across appellants' porch. Spoliation of evidence by Allgas removing tank from the fire scene and destroying parts and evidence before the state LP Gasboard investigator or plaintiffs or plaintiffs' expert witness could inspect fire scene. 3)AEMLD defective clothes dryer. Allgas admitted that plaintiffs had a claim under AEMLD .Expert witness of defendants stated that the fire started in the room that contained the clothes dryer. 5) expert witness of plaintiffs stated that the defective clothes dryer ignited the leaking propane gas and that destroyed the house. 6) plaintiff testified that he smelled gas in the night before the fire. 7)defendants' expert witness, Pyrotec, destroyed evidence by dismantling and destroying the clothes dryer and failed to give a copy of his report to the plaintiff. 8) plaintiffs produced substantial evidence in support of their claims and the defendants failed to produce any evidence contradicting the plaintiffs substantiating evidence as to the causal of the fire and the defendant or expert witness stated that the fire started in the room that contained the clothes dryer. The defendant failed to give any evidence as to the cause of the fire.

In July, Frigidaire announced a recall with an ad in major newspapers. It said, in controlled tests, they had identified a potential safety hazard, overheating and fire . Frigidaire offered to supply a new one, for $230." The heating element at the back of the dryer sagged and made contact with the back.The coil overheats and sags far enough to touch the plate, creating its own electrical circuit.So even when the

machine shuts off, the coil stays on, and on, getting hotter and hotter causing fires.

According to Gord Dawes, a serviceman, he states, "I think Frigidaire knows a lot more than what they're saying. basically, they tell me that the - there is a definite heater warping problem on these dryers, that when the heater sagging shorts out onto the frame, it can stay on and can start - has a potential of starting that fire. This can happen even if it is totally properly installed. Frigidaire had a partial fix with a switch.This is proof that Frigidaire had recalls on their dryers.

The appellants' Writ of Certiorari was denied by the Supreme Court and a review of the original petition for the Writ of Certiorari should be reviewed to direct the trial judge for relief. The appellant has requested a trial by jury because the trial judge wrongfully, with bias, was against the Pro Se appellants and against the AEMLD and spoliation claims could only be settled by a jury trial. This is as stated in ARCP Rule 21 :(1.) clear legal right of the appellant to the order sought. (2.) an imperative duty upon the respondent in perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy, and (4) properly invoked jurisdiction of the court.The Writ of Certirorai should be granted when there is a clear showing that in this case the Circuit Court violated the petitioners' due process and equal protection, abused its discretion, and exercised it in an arbitrary or copricious manner. Ex parte state ex rel McKinney, 575, So.2d 1024 (Ala. 1990) show how Jolley abused his discretion by not allowing a trial of the facts and issues and the defendants admission of an AEMLD claim of the appellant. Defendants spoliation of evidence that can only be settled by jury

trail.

The NFPA 921 Guide for Fire and Explosion Investigation, published by the National Fire Protection Association, states that the fire scene itself is considered to be evidence and "the examination and analysis of that fire scene is vitally important in determining the origin of the fire, the cause of the fire, and the responsibility for the fire " NFPA 921, S 9-3-1 , at p. 921-66 (1995 ed)

Courts have recognized the damaging effect to plaintiffs where the defendants like Frigidaire and Allgas destroyed the propane gas lines under the house and removed the propane tank and replaced damaged parts on the propane gas tank and painted it before it could be inspected by the state liquified petroleum gasboard inspector violated state law that all propane gas components are to remain at the fire scene. Courts have imposed sanctions for spoliation of evidence to instructing the jury that it may assume that any destroyed evidence would have been unfavorable to the spoliator. *Schmid v Milwaukee Electronic Tool Corp,* 13 F.3d 76, 78 (3d Cir. 1994); *Baliotis v. McNeil, 870 F. Supp. 1285 (M.D.Pa. 1994).* Only a jury can decide a defective clothes dryer with fraud on the recall and spoliation case . The circuit judge, Jolley, erred with assuming judgment against the plaintiff. The judge failed to allow the case to go to the jury and Allgas has not denied that they did not spoil evidence at the fire scene; therefore admitting guilt.

The defendant, Frigidaire's expert witness destroyed the clothes dryer by dismantling the dryer at the fire scene and was guilty of spoliation.

CONCLUSION

The petitioners ask this Honorable Supreme Court grant certiorari and vacate the Alabama Supreme Court's decision and send the case back to Alabama courts for a trial.

These petitioners have been defrauded out of justice by this circuit judge and these defendant attorneys and have been denied justice under the U.S. Constitution and pray for relief that this honorable court will allow this petition for a writ of certiorari.

Respectfully submitted, February 15 ,2001

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APPENDIX A - ORDER STRIKING THE APPLICATION FOR REHEARING AND TO REMAND TO CIRCUIT COURT FOR A TRIAL BY JURY, DATED DECEMBER 13, 2000

IN THE SUPREME COURT OF ALABAMA
December 13, 2000

1992165

Ex parte Bobby W. Kennedy, Carolyn S. Kennedy, and Jimmy Kennedy. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re : Bobby W. Kennedy et al. v. Frigidaire Inc., et al.) (Marshall Cir. Ct.No. : CV-97-150) (Low'r. App.Ct.No. : 2990444)

ORDER

IT IS ORDERED that the motion to set aside the order striking the application for rehearing and to remand to circuit court for a trial by jury filed in this cause on December 8, 2000, be, and the same is hereby, stricken.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this13th day of December, 2000.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX B - ORDER STRIKING APPLICATION FOR REHEARING,DATED DECEMBER 1, 2000

IN THE SUPREME COURT OF ALABAMA
December 1, 2000

1992165

Ex parte Bobby W. Kennedy, Carolyn S. Kennedy and Jimmy Kennedy, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re : Bobby W. Kennedy et al. v. Frigidaire Inc., et al.) (Marshall Cir.Ct.No. : CV-97-150) (Low'r.App.Ct.No. : 2990444)

ORDER

IT IS ORDERED that the application for rehearing filed in this cause on November 28, 2000, be, and the same is hereby, stricken in accordance with the provisions of Rule 39(1) , Alabama Rules of Appellate Procedure.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 1st day of December, 2000.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX C - PETITION FOR WRIT OF CERTIORARI IS DENIED. NO OPINION, DATED NOVEMBER 17 , 2000

IN THE SUPREME COURT OF ALABAMA

November 17, 2000

1992165

Ex parte Bobby W. Kennedy, Carolyn S. Kennedy and Jimmy Kennedy. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re : Bobby W. Kennedy et al. v. Frigidaire Inc., et al.) (Marshall Cir.Ct.No.: CV 97-150 (Low'r.App.Ct.No.: 2990444)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

MADDOX, J. - HOOPER, C.J., and Cook, Lyons, and Johnstone, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as sam appear(s) of record in said Court.
Witness my hand this 17th day of November , 2000.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX D- APPLICATIN FOR REHEARING OVERRULED. 39 (k) MOTION DENIED DATED AUGUST 4, 2000

August 4, 2000

THE COURT OF CIVIL APPEALS OF ALABAMA

RE : 2990444

Bobby W. Kennedy et al. v. Frigidaire et al. (Appeal from Marshall County Circuit Cout, Guntersville Division : CV 97-150).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals :

Application for Rehearing Overruled. No Opinion written on rehearing. 39 (k) Motion Denied.

John H. Wilkerson, Jr.
John H. Wilkerson, Jr. Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

APPENDIX E - APPEAL FROM MARSHALL CIRCUIT COURT AFFIRMED, DATED JUNE 9, 2000.

June 09 2000

STATE OF ALABAMA - - -JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 1999-2000

2990444

Bobby W. Kennedy et al. v. Frigidaire, Inc., et al., Appeal from Marshall Circuit Court (CV-97-150)

CRAWLEY, Judge

AFFIRMED. NO OPINION

See Rule 53 (a) (1) and (a) (2) (F), Ala. R. App. P.; Rule 28, Ala. R. App. P.; Messr v. Messer, 621 So. 2d 1343 (Ala. Civ. App. 1993); and Bishop v. Robinson, 516 So. 2d 723 (Ala. Civ. App. 1987).

This case was transferred to this court by the Supreme Court pursuant to Ala. Code 1975, S 12-2-7(6).

Robertson, P.J., and Yates, Monroe, and Thompson, JJ., concur.

John H. Wilkerson, Jr. Clerk of the Court of Civil Appeals of Alabama, do hereby certify the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of

record in said court.

Witness my hand this 9th day of June, 2000.
John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals of Alabama

APPENDIX F - REQUEST FOR ORAL ARGUMENT DENIED, DATED MAY 31, 2000

May 31, 2000

THE STATE OF ALABAMA
THE COURT OF CIVIL APPEALS

2990444

Bobby W. Kennedy, et al. v. Frigidaire, et al. (Appeal from Marshall County Circuit Court, Guntersville Division : CV 97-150).

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals :

Pursuant to ARAP Rule 34, as amended, oral argument request, briefs, and record having been considered, the Court is of the opinion that oral argument is not necessary for proper disposition of this appeal.

Therefore, request for oral argument is denied, and the appeal is submitted on briefs as of this date.

John H. Wilkerson, Jr., Clerk
John H. wilkerson, Jr. Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4093

APPENDIX G - APPELLANTS' AND APPELLEES' MOTIONS TO SUPPLEMENT THE RECORD IS GRANTED, DATED APRIL 4, 2000

April 4, 2000

THE COURT OF CIVIL APPEALS OF ALABAMA

RE : 2990444

Bobby W. Kennedy, et al. v. Frigidaire, et al.
(Appeal from Marshall County Circuit Court, Guntersville Division : CV 97-150).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals :

Appellants' and appellees' motions to supplement the record are granted. Trial court clerk is directed to supplement the recrod on appeal.

John H. Wilkerson, Jr. Clerk
John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

APPENDIX H - ORDER THAT THIS CAUSE IS TRANSFERRED TO THE COURT OF CIVIL APPEALS, DATED FEBRUARY 1, 2000

IN THE SUPREME COURT OF ALABAMA
February 1, 2000

1990695

Bobby W. Kennedy et al. v. Frigidaire et al.
(Marshall [Guntersville] Cir.Ct.No. : CV 97-150)

ORDER

IT IS ORDERED that this cause isi transferred to the Court of civil appeals pursuant to S 12-2-7, Code of Alabama 1975.

IT IS FURTHER ORDERED that further proceedings in this cause shall be filed with the Court of Civil Appeals pursuant to th rulels of procedure applicable to that court.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 1st day of February, 2000.
Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX I - - DOCKET SHEET LIST OF JUDGE'S DECISIONS DATED 9-28-99 TO 1-7-00

00011
CV-97-000150.00
JUDGE : HON. TIM JOLLEY

1-7-00 This Court's granting of summary Judgment was as to all defendants on all claims and the Summary Judgment of 8-30-99 is a final judgment because it disposed of all pending issues as to all parties. TJ

12-13-99 Concerning plaintiffs Motion to Compel White Industries, the discoverable documents were produced and on that was work product previously. Motion denied. T Jolley

00010
CV 97 000150.00
JUDGE : HON. TIM JOLLEY

12-7-99 After considering plaintiffs' Motion for New Trial/and/or to Alter, Amend and Vacate The Summary Judgment, together with all submissions and argument of counselor plaintiffs' Motion at the hearing held November 15, 1999, said motion is denied. T Jolley

10-7-99 Motion for New Trial, etc. set for hearing Nov. 5, 1999 at 8 :30 A.M. Cout Reporter to be present at hearing. T.J.

9-28-99 In response to the letter of Dan King dated sept 3, 1999, this Court did have all submissions when it granted summary judgment on 8-30-99. T. Jolley

APPENDIX J - - MOTION FOR NEW TRIAL AND/OR TO ALTER, AMEND AND VACATE THEE SUMMARY JUDGMENT ORDER AND REQUEST FOR ORAL ARGUMENT DATED 9-24-99

IN THE CIRCUIT COUT OF MARSHALL COUNTY, ALABAMA GUNTERSVILLE DIVISION

BOBBY W. KENNEDY, et al

PLAINTIFFS

VS. **CIVIL ACTION NUMBER : CV-97-150J**

FRIGIDAIRE COMPANY, et al.

DEFENDANTS

MOTION FOR NEW TRIAL AND/OR TO ALTER AMEND AND VACATE THE SUMMARY JUDGMENT ORDER AND REQUEST FOR ORAL ARGUMENT

Come now the plaintiffs, by and through counsel, and move this Honorable Court, pursuant to Rule 59 of the ARCP, for the Court to enter an Order granting a new trial and/or altering, amending and/or vacating the summary judgment entered by the Court

FILED
Sep 24 1999
Sherry G. Griep
Clerk of the Circuit/District Court Marshall County Alabama

on the 30th day of August, 1999, and request *oral arugment*. For grounds the plaintiffs show this Honorable Court the following :

1. That the affidavits and other exhibits filed by the plaintiffs were not untimely filed and should not have been stricken. that the affidavit of plaintffs' exper does not contradict his deposition testimony and should not have been stricken for that reason. If the Court looks at the deposition of Steve Holich, plaintiff's independent expert, he testified under oath exactly as he did in his affidavit that the clothes dryer of the defendant caused the propane gas to ignite causing the fire (See Steve Holich deposition page 193.) At page 213 of Steve Holich's deposition he testified as he continued to testify all through his deposition that, it was his opinion that the clothes dryer started the fire. From 193 through the end of the deposition, Steve Holich, continued to testify to various things that he believed supported his opinion, as aforesaid. One thing that he testified proved without a doubt that the fire in fact started inside the house and did not start outside the house as the defendants' expert claim was that the house window glass was in fact smoke stained from the inside in the corner room closest to the dryer. See page 213.

The fact that even the defendant's attorney of record knows after reading plaintiffs' indipendent experts', Steve Holichs' deposition, that it was in fact Steve Holich's deposition testimony that the fire was started by the clothes dryer. See the defendnat's Lampton Love, Inc., et al. memorandum brief in support of their Motion for Summary Judgment, page 8 paragraph 15 "as to the cause of the fire, Steve

Holich testified that in his opinion the fire started when propane leaked from a point inside the house and was ignited by the clothes dryer. (S. Holich depo., page 193). The plaintiff's submitted sufficient legal evidence affidavits, etc., in a timely fashion and the evidence clearly shows that there are genuine issues of material facts so that summary judgment should not be granted as a matter of law. The plaintiff's legal evidence affidavits, etc., were in fact filed in a timely fashion as aforesaid and the Court did in fact give leave to the plaintiff's attorney of record to serve the defendants' attorney of record with copies of the plaintiffs affidavits, etc. did give plaintiffs attorney of record leave to serve defendants' attorney of record with those exhibits within a period of 7 days from August 23, 1999, and that was in fact done. The defendant, Lampton Love, Inc., et al. attorneys of record , in their memorandum brief in support of their Motion for Summary Judgment in fact admitted just as the plaintiffs contend that the plaintiffs' indipendent expert Steve Holich did in fact, in his deposition, give testimony that was his opinion that the fire was started by the clothes dryer. See Lampton Love, Inc., et al., memorandum brief in support of Motion for Summary Judgment, page 8, paragraph 15 "as to the cause of the fire, Steve Holich testified that in his opinion the fire started when the propane leaked from a point inside the house and was ignited by the clothes dryer." (S. Hollich depo., p. 193)

2. That the plaintiffs produced legal evidence that reveal that there are in fact genuine isisues of material fact so that Summay Judgment should not

have been granted as a matter of law. In Goodwin vs. Barry Miller Chevrolet, Inc. 543 So. 2d 1171 (Ala. 1989), where the Supreme Court held that the Trial Judge committed error by not considering the plaintiff's deposition when he ruled on the Motion for Partial Summary Judgment. The deposition was part of the record and allegedly stated genuine issues of material fat that precluded the granting of summary judgment and the Supreme Court wen on to hold that a Trial Judge must considr all the evidence before him, including depositions. The standard of whether or not a Motion for Summary Judgment should be grnated has been the same for a long period of time. The Supreme Court of Alabama in Tobert vs. Gulsby stated in a Motion for Summary Judgment all reasonable inferences from the facts are viewed most favorably to the non moving party and the moving party is required to establish that the other party could not recover under any discernable circumstances . Tolbert vs .Gulsby, 333 So. 2d 129 (Ala. 1976). Under Alabama law where the trial court enters summary judgment there is no presumption on appeal of correctness of the Trial Court's finding and the review isi de novo. Macy vs. American Shelf Company, 528 So.2d 684 (Ala. Civ. App. 1993)

3. That the legal evidence submitted to the Court by the plaintiffs that was in fact timely filed and of record when viewed in the light most favorable to the plaintiffs/non-movants, clearly establishes that there are in fact genuine issues of material fact so that summary judgment should not be granted in the defendant's favor as a matter of law, so that the summary judgment of the Court is

contrary to the evidence presented to thee Court and the law of Alabama.

WHEREFORE, premises considered, plaintiffs request this Honorable Court to allow additional oral argument with respect to this Motion and following hearing, the plaintiffs request this Honorable Court to set aside the Order of Summary Judgment of August 30, 1999, and allow the plaintiffs to try their claims as against the defendants by jury as this would best serve the intrest of justice.

BY:_____
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Attorney for Plaintiffs

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing were placed in the opposing counsel's box in the Etoway County Clerk's Office and/or mailed U.S. Postage prepaid, on this the 24 day of September 1999.

Daniel King
Of Counsel

APPENDIX K - - ORDER GRANTING SUMMARY JUDGMENT DATED 8-30-99

IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA

BOBBY W. KENNEDY, et al.
PLAINTIFFS,

VS. CASE NO. CV 97-150-J

FRIGIDAIRE COMPANY, et al.,
DEFENDANTS.

ORDER GRANTING SUMMARY JUDGMENT

The Court, after considering argument of counsel, pleadings, depositions, affidavits, and other submissions, finds the following :

1. The affidavits filed by plaintiffs were untimely filed and are stricken. Further the affidavit of plaintiffs' expert contradicts his deposition testimony and is stricken also for that reason.

2. The deposition of plaintiff's expert (taken beefore the affidavit was given by him) indicates that there is nothing more than mere speculation as to several possible causes of the fire and no defect of any manufactured product of any defendant was shown to exist. further there was no probable cause shown as to the cause of the fire as a result of any defendant's negligence.

3. Plaintiffs' failure to produce substantial evidence in support of their claims entitle defendants

to a judgment as a matter of law.

4. There is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law. Summary judgment is GRANTED in favor of the defendants and against the plaintiffs.

5. Costs are taxed as paid.

DONE this 30th day of August, 1999.

Tim Jolley
Tim Jolley
Circuit Judge

FILED
Aug 30 1999

Sherry Griep
Clerk of the Circuit/
District Court ,
Marshall County, Alabama

cc : Wilson
Christie
Motlow
King
8-31-99